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Third Court of Appeals
P.O. Box 1254
Austin, TX 78711

March 15, 2022

Greg Abbott, et al v. Jane Doe, et. al
Cause No: 03-22-00126-CV
Amicus Brief re: Notice of Appeal

Dear Honorable Justices of the Third Court of Appeals:

I am not being compensated by anyone for the preparation, writing and filing of this amicus brief.

I solely write to preserve and protect the fairness of the Texas administrative system in general, and the act of rulemaking in particular.

Based on undisputed facts and undisputed law as pled by the Appellant and Appellee at the District Court, the AG Opinion KP-0401, the Governor's letter of 2/22/22, and the order, orally announced and implemented by Commissioner Jaime Masters, such statements fall within the definition of a "rule," *Tex. Gov't Code Section* 2001.003(6), which upon its issuance was and is invalid and legally ineffective.

A challenge to the validity and applicability of an agency rule by the Appellees pursuant to *Tex. Gov't Code, Section* 2001.038 is a legislative grant of subject matter jurisdiction in the judiciary, *Machete's Chop Shop v. The Texas Film Comm'n*, 483 S.W.3d 272, 286 (Tex. App.-Austin 2016); *S.W. Bell Tele. Co. v. P.U.C. of Tex.*, 735 S.W.2d 663, 669 (Tex. App.-Austin 1987).

Section 2001.038 is also a legislative, limited waiver of sovereign immunity in order that Appellees may legally challenge rules, procedurally or substantively, adopted by state agencies subject to the APA, *Tex. Dept. of Ins. v. Tex. Assoc. of*

Health Plans, 598 S.W.3d 417, 421 (Tex. App.-Austin 2020); *Dept. of Human Services v. ARA Living Centers of Tex. Inc.*, 833 S.W.2d 689, 693 (Tex. App.-Austin 1992, writ denied).

Commissioner Master's oral adoption of the Attorney General Opinion No. KP-0401 and Governor Abbott's letter of 2/22/22, is without doubt a "rule" pursuant to the APA due to the fact:

Former Chief Justice Woodie Jones, on behalf of this Court, held 13 years ago that when a **state agency** adopts a **new interpretative statement of its regulatory statute** as to what constitutes child abuse, that **implements and prescribes** its provisions with an express, unambiguous intent to apply such construction **generally applicable** to all future cases **involving all persons similarly situated**, regardless of the particular circumstances, and which will **affect the private rights of persons** by either loss of custody of a child, civil penalties, fines and possible revocation of professional licenses, constitutes a "rule" under the APA, *Combs v. Ent. Publ'ns, Inc.*, 292 S.W.3d 712, 721-21 (Tex. App.-Austin 2009), *see Tex. Gov't Code Section 2001.003(6)*.

In addition, Chief Justice Jones held on behalf of this Court, that a total failure to adopt such statement pursuant to APA rulemaking procedures renders such statement void, *Combs, v. Ent. Publ'ns Inc.*, 292 S.W.3d 712, 720-21 (Tex. App.-Austin 2009); *see also El Paso Hosp. Dist. v. Tex. Health & Human Resources*, 247 S.W.3d 709, 715 (Tex. 2008); and if such statement is subject to remand, the rule remains void during the remand period, *Combs*, 292 S.W.3d at 723-24; *see also, Tex. Gov't Code, Section 2001.040 (good cause to invalidate the rule...effective as the date of the court's order)*.

Finally, and just as legally significant, the failure of the agency to file the rule with the Secretary of State renders the statement legally ineffective to all persons subject to its provisions, *Tex. Gov't Code, Section 2001.036(a)*. In addition, a defective rule that is not legally effective is not subject to remand to allow the agency to cure its procedural defects, *Id. at Sections 2001.040 and 2001.035(a)*, (*filing is not subject to substantial compliance so 2001.040 does not apply and a rule may not "remain" in effect when it has never been in effect*).

Thus, the "rule" adopted by Commissioner Masters was and is a legal nullity; void and legally ineffective.

Chief Justice Jones opinion on behalf of this Court literally shut down agencies' ability to adopt significant redefinitions of regulatory statutes with immediate legal impact without public and regulated party input which was/is wholly contrary to one of the express goals of the APA, *Tex. Gov't Code, Section 2001.001(2)*. It is vital to the entire administrative process that such unlawfully adopted interpretive rules adopted without notice and comment rulemaking be held to be void and permanently enjoined.

There is simply nothing else that needs to be considered and this appeal by Attorney General Paxton is utterly frivolous and a total waste of time for this Court and all parties and lawyers acting on their behalf. The District Court and this Court have subject matter jurisdiction, there is a limited waiver of sovereign immunity, and the rule adopted is procedurally void and legally ineffective. **How can an agency defend and apply a "rule" with no legal effective date? Solely in bad faith?**

I believe that Governor Abbott, the Attorney General and Commissioner Masters must immediately withdraw this purported, but legally defective rule and commence, if at all, a bona fide notice and comment process to discuss and consider all evidence related to the issues involved and engage in a rational, word-based analysis of the relevant statutory provisions to determine the correct legislative intent. **This appeal is simply legally worthless and must be withdrawn immediately.**

Without such action taken by Attorney General Paxton, I humbly submit that the undisputed facts and law as set forth above empowers this Court to immediately, without further briefing and/or oral argument, reinstate the temporary injunction and render on the issues set forth in this appeal.

Sincerely,
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CERTIFICATE OF COMPLIANCE

I certify that this document was produced on a computer using Microsoft Word and contains 927 words, as determined by the computer's software's word count function, excluding the sections of the document listed in Texas Rules of Appellate Procedure 9.4(i)(1).

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document has been served on March 15, 2022, by e-file and/or electronic mail in accordance with the Texas Rules of Civil Procedure to the following:

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